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Legal Aspects Of ASAP / Urinalysis

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REFERENCES

- **DoD Directive 1010.1, Military Personnel Drug Abuse Testing Program (9 Dec 1995) (Change 1, 11 Jan 1999)**
- **DoD Instruction 1010.16 (9 Dec 1994)**
- **Army Regulation 600-85, Army Substance Abuse Program (1 Oct 2001)**

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- **Abuse of alcohol and drugs is considered “incompatible with military service.”**
- **Soldiers who do so are subject to:**
 - **UCMJ Article 112**
 - **UCMJ Article 112a**
 - **UCMJ Article 134**
 - **Admin Sep (Chapter 9, Chapter 14)**

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In accordance with Garrison Command Policy Memo 05-24, upon notification that a Soldier has tested positive, the unit commander will NOT notify the Soldier. The commander will contact Military Police Investigations through the Provost Marshall's Office in the case of THC (marijuana), or CID in all other cases, for the initial interview.

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Separation



- **IAW AR 635-200 Chapter 12 -14c(2)
Abuse of illegal drugs is serious misconduct.**

**(b) All soldiers against whom charges will not be referred to
a
court-martial authorized to impose a punitive
discharge or against whom separation action will not be
initiated
under the provisions of chapter 9 or section II of this
chapter will be processed for separation under *a*, *b*, or *c*,
above, as
applicable.**

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Urinalysis / Limited Use Policy

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- **Urinalysis is an authorized command-directed program IAW AR 600-85**
- **Command may order urinalysis/testing as follows:**
 - a. **Probable cause urinalysis**
 - b. **Consent urinalysis**
 - c. **Valid medical purpose**
 - d. **Fitness for Duty (where commander does not have probable cause, but has “reasonable suspicion” and wants to ensure fitness for duty - LUP)**

AND . . .

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- . . . pursuant a random inspection program.**
 - No probable cause needed**
 - Personnel to be tested should be selected randomly, not targeted specifically**
 - Cannot use this program as a subterfuge to test a specific individual suspected of drug use**
 - Evidence admissible at court martial**

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Admissibility of Test Results



- Results of Urinalysis are generally admissible in administrative and disciplinary proceedings, subject to the Army's Limited Use Policy
- Where command violates the constitution (e.g., targets an individual without probable cause), results are inadmissible for UCMJ purposes. Still admissible for Nonjudicial Punishment and Admin Separation.
- If command violates constitution knowingly/in bad faith, results will not be admissible for Admin Sep purposes.

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Admissibility, continued:



What if urinalysis procedures are not followed?

- Minor deviations from procedures generally do not affect admissibility of test results
- However, serious deviations from the urinalysis regulation may allow exclusion of positive test results
- Defense counsel will always scrutinize procedures used and consider whether to challenge the test results on this basis

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Limited Use Policy



Generally, this policy prohibits the use of certain evidence against a soldier in actions under UCMJ, or for purposes of characterization of service in an admin separation proceeding. The rationale is to facilitate identification of abusers through self-referral and to encourage treatment/rehabilitation. It is not intended to protect a member who is attempting to avoid adverse action.

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Limited Use Info

- - Results of mandatory fitness for duty test based on “reasonable suspicion”
- - Self-referral to ASAP, and/or the fact that a soldier needed counseling, rehabilitation, or medical treatment in conjunction with ASAP participation
- - Admissions made by soldier as part of initial entry to ASAP, limited to personal use occurring prior to date of initial referral

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Limited Use Info, continued:

- - Admissions made by soldier enrolled in ASAP to physician or ASAP counselor during a scheduled interview, limited to personal use occurring prior to date of initial referral
- - Information concerning drug or alcohol abuse/possession incidental to personal use obtained as a result of soldier's emergency medical care for overdose, unless such treatment resulted from apprehension by law enforcement.

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- **LUP Does not prohibit:**
 - - **The use of information that an ASAP client committed another offense while under influence of drugs or alcohol.**
 - - **The release of information to a commander concerning illegal acts having an adverse impact on mission, national security, or health and welfare of others.**
 - - **The use of LUP information as evidence in a proceeding wherein the soldier has put the issue of drug abuse (or lack thereof) into evidence first.**

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continued:

- - UCMJ action or separation based on independently derived evidence of drug or alcohol abuse.**
- - Other adverse administrative actions, such as written reprimands, bars to reenlistment, revocation of security clearances, or reductions for inefficiency, based on LUP evidence.**

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PROVING THE CASE



To be found guilty, the Government must prove the accused knew that:

- a. He or she consumed the relevant substance**
- b. The substance was contraband.**

Permissible inference that accused knowingly used presence of drug in urine.

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THE DEFENSES



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CHAIN OF CUSTODY



“The chain of custody has been broken!”

- To sustain a conviction, the government must demonstrate a reasonable probability that the urine was taken from the accused, and preserved unaltered until tested at the laboratory. U.S. v. Maxwell, 38 MJ 148 (CMA 1993)
- Best evidence – fully signed chain of custody forms!
- BUT – can bridge this break in custody with testimony at trial. U.S. v. Brown, 52 MJ 565 (ACCA 1999)

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LABORATORY ERROR



“The Lab failed to save my urine sample and I want it retested!”

- If lab fails to retain sample in violation of regulations, test result is not admissible. U.S. v. Manuel, 43 MJ 282 (1995)**
- Gross deviation from regulation is required to suppress evidence. U.S. v. Timoney, 34 MJ 1108 (ACMR 1992)**

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PASSIVE INHALATION



“I was at a party, and the smoke was heavy”

- Possible - Soldier must have been exposed to concentrated drug smoke in small area for a significant period of time**

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INNOCENT INGESTION, INHALATION, ABSORPTION

“Someone put raw cocaine in my urine sample”

“Someone put raw cocaine in my drink”

- DoD tests for BZE (metabolism not needed)**
- DoD CAN test for EME (ecgonine methylester) which results from metabolism**
- EME dissipates from the body faster than BZE**

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“INNOCENT” DEFENSES (CONT)



**“Someone gave me a brownie at a party –
it must have had marijuana in it!”**

- Credibility?**
- Does timing of ingestion track with nanogram levels?**

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GOOD SOLDIER DEFENSE



“Someone framed me, I’m a good soldier. Good soldiers do not use drugs.”

- **Permissive inference. U.S. v. Graham, 50 MJ 56, 58-59 (1999); U.S. v. Mance, 26 MJ 244 (1988)**
- **Good soldier evidence alone is enough to acquit. U.S. v. Vandelinder, 20 MJ 41 (1985)**

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Questions?

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